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No. 94-1238

In The

Supreme Court of the United States

October Term, 1994

WILLIE LLOYD TURNER,

Petitioner,

v.

JOHN JABE, WARDEN,
GREENSVILLE CORRECTIONAL CENTER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER PETITIONER'S ARGUMENT AGAINST THE CONSTITUTIONALITY OF VIRGINIA'S STATUTORY VILENESS PREDICATE IS NOT COGNIZABLE UNDER THE "NEW RULE" DOCTRINE IN *TEAGUE V. LANE*, 489 U.S. 288 (1989), AND ITS PROGENY?

II. WHETHER PETITIONER'S CHALLENGE TO THE VILENESS CIRCUMSTANCE OTHERWISE IS NOT REVIEWABLE BECAUSE IT ONLY RAISES A STATE LAW CLAIM AND BECAUSE PETITIONER HAS PROCEDURALLY DEFAULTED ON IT?

III. WHETHER PETITIONER'S VILENESS ARGUMENT FAILS TO RAISE A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION?

IV. WHETHER PETITIONER'S CLAIM THAT TRIAL COUNSEL WERE INEFFECTIVE IS TOO FACT-SPECIFIC AND TOO INSUBSTANTIAL TO WARRANT THIS COURT'S DISCRETIONARY REVIEW?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 35 F.3d 872 (4th Cir. 1994). The opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division, is reported at 812 F. Supp. 1400 (E.D. Va. 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are recited in the appendix to the petition at 175-178.

STATEMENT OF THE CASE

Petitioner was indicted by a Southampton County, Virginia grand jury for the capital murder of W. Jack Smith, Jr. on July 12, 1978.[1] After a change of venue, the trial was held in Northampton County. After a jury trial in which Turner was convicted on all counts, the trial court on February 6, 1980 sentenced him to death on the capital murder conviction.[2] Thereafter, the Supreme Court of Virginia affirmed. *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980). After petitioner unsuccessfully sought certiorari in this Court and habeas relief in the state courts and federal district court in Norfolk, he appealed to the Fourth Circuit, which affirmed the district court's denial of habeas relief. *Turner v. Bass*, 753 F.2d 342 (4th Cir. 1985).

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[1] Turner was charged under former § 18.2-31(d) of the Code of Virginia with the premeditated killing of Smith in the commission of a robbery while armed with a deadly weapon. Turner was also indicted for, and convicted of, use of a firearm in the commission of murder and possession of a sawed-off shotgun in the commission of robbery.

[2] All subsequent references to this trial as well as the direct appeal and state and federal habeas corpus proceedings stemming from it will hereinafter be designated as "*Turner I.*"

This Court then granted certiorari. While upholding Turner's capital murder conviction, the Court vacated his death sentence and ordered a new sentencing hearing. *Turner v. Murray*, 476 U.S. 28 (1986).

After the return of this case to the Circuit Court of Southampton County, the court again ordered a change of venue, this time to Prince Edward County. On January 12, 1987, after a four-day resentencing trial, the jury sentenced petitioner to death. On March 16, 1987, the trial court upheld the jury's sentence.[3] On appeal, the Supreme Court of Virginia again affirmed. *Turner v. Commonwealth*, 234 Va. 543, 364 S.E.2d 483 (1988). This Court then denied certiorari. *Turner v. Virginia*, 486 U.S. 1017 (1988).

Turner then filed a habeas corpus petition in the Circuit Court of Southampton County. After conducting oral argument on respondent's motion to dismiss, the state court dismissed the majority of the allegations but ordered a plenary hearing on several ineffective counsel claims. The circuit court conducted the evidentiary hearing on September 11-13, 1989. On July 5, 1990, the circuit court dismissed the petition in its entirety. On September 5, 1990, the state court denied petitioner's motion for leave to amend the habeas petition and to modify the final order. The Supreme Court of Virginia denied Turner's petition for appeal by order dated April 30, 1991.

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[3] Further references to this resentencing proceeding as well as the direct appeal and state and federal habeas proceedings arising out of it will be designated as "*Turner II*."

Turner next filed a habeas corpus petition in the United States District Court in Alexandria. After conducting oral argument on respondent's motion to dismiss on August 28, 1992, the district court on February 1, 1993, entered an order denying the habeas petition. *Turner v. Williams*, 812 F. Supp. 1400 (E.D. Va. 1993). On appeal, the Fourth Circuit affirmed the district court's ruling. *Turner v. Williams*, 35 F.3d 872 (4th Cir. 1994). On October 17, 1994, the Fourth Circuit denied rehearing. On October 24, 1994, the mandate of the Fourth Circuit issued.

STATEMENT OF FACTS

On July 12, 1978, petitioner entered Smith Jewelers located in Franklin, Virginia at about 11:20 a.m.[4] Using a sawed-off shotgun wrapped in a towel, Turner silently motioned the various customers and employees to line up against the counter of one side of the store and then forced the proprietor, W. Jack Smith, Jr., to stuff money from the cash register into some jewelry bags.[5] As he did this, Smith activated a silent alarm to the police department. Then, Mrs. Judith Cosby came into the store.

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[4] The facts relevant to the capital murder are recited in the opinion of the Supreme Court of Virginia on direct appeal in *Turner II*. *Turner v. Commonwealth*, 234 Va. at 546, 364 S.E.2d at 484-485.

[5] In the resentencing hearing, the Commonwealth read into evidence the verbatim testimony of the witnesses who had been present in the jewelry store in the minutes leading up to the murder of Jack Smith and who later testified in *Turner I*.

Petitioner likewise motioned her to go to the counter and kicked her as she did so.

Then, after Officer Alan D. Bain, Jr. came in and asked Smith why the alarm was on and whether anything was wrong, Turner forced him to give up his revolver. Turner put it in his pocket while continuing to hold the shotgun. Petitioner then made Smith turn the alarm off and fill up more jewelry bags with store merchandise.

Turner subsequently took the pistol from his pocket and put it in his right hand, switching the shotgun to his left hand. As he tossed the pistol, it discharged and the shot went towards the back of the store. After Bain assured Turner that no one was coming in the back, petitioner went to the middle of the room, "just looked at Mr. Smith and fired the [pistol] at" him, causing him to "yell like a puppy and [fall] to the floor. . . . " Smith fell down behind the counter and began bleeding from a head wound. While it did not cause Smith's death, the shot did injure his brain. Turner was about 12 to 15 feet from Smith when he "just pointed right at [him] and fired" without warning or provocation.

At this point, Officer Bain attempted to reason with Turner and promised to take him out of town if he would not shoot anyone else. Petitioner replied, however, that he was "going to kill that nigger for snitching on me." As Smith lay helpless and "gurgling" on the floor, Turner approached him, looked down at him over the counter, and shot him two times in the chest in a "rapid fire" manner. These shots caused Smith to jump; he did not move after that. Medical testimony established that either of these latter two shots would have been independently

fatal. Thereafter, Bain knocked the firearms away from petitioner and was able to subdue him until other police officers came to the scene.

After the Commonwealth rested, the defense presented no mitigating evidence, based on trial counsel's tactical judgment that any such evidence might be substantially outweighed by aggravating evidence put on in rebuttal by the Commonwealth. At the conclusion of the trial, the jury sentenced Turner to death, based solely upon a finding that the murder had been "vile." *See* § 19.2-264.4 of the Code of Virginia. On March 16, 1987, the trial court upheld the jury's sentence and imposed the death penalty.

Thereafter, as found by the state habeas circuit court, trial counsel, two highly experienced and able attorneys, diligently investigated available lay and expert mitigating evidence in preparation for the resentencing proceeding.[6] For example, counsel obtained substantial evidence as to Turner's role in the planning and execution of the escape of six Virginia death row inmates from Mecklenburg Correctional Center in May, 1984, and the attempted escape of Turner and several other death row prisoners in November, 1985. Counsel also examined petitioner's prison file and mental health records and interviewed several of Turner's relatives about his background. Trial counsel decided not to defend on the basis of any mental

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[6] The Fourth Circuit's opinion, which was based upon the state habeas court's factual findings as well as its own independent review of the record, recites the facts relevant to Turner's ineffective counsel claim. *Turner v. Williams*, 35 F.3d at 895-904. *See also Turner v. Williams*, 812 F. Supp. at 1430-1432.

health disorder; the habeas court found that Turner had no statutory or non-statutory mental health mitigating circumstance.

Finally, the state habeas circuit court found that counsel were prepared to put on both expert and lay evidence in mitigation. They made an informed decision to rest, however, without putting on any evidence, based primarily on their assessment that any evidence they might present would be overwhelmed by the rebuttal evidence which the Commonwealth had held back in its case-in-chief.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S ARGUMENT ATTACKING THE CONSTITUTIONALITY OF VIRGINIA'S STATUTORY VILENESS FACTOR IS A NON-REVIEWABLE "NEW RULE" UNDER *TEAGUE V. LANE*, 489 U.S. 288 (1989), AND ITS PROGENY.

Petitioner's challenge to Virginia's statutory vileness predicate is not cognizable under the "new rule" doctrine in *Teague v. Lane* and its progeny. In *Teague*, this Court ruled that new federal constitutional rules do not apply on federal habeas corpus review to cases which are final unless either of two narrow exceptions exists. This Court stated that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301 (emphasis in original). Subsequently, the Court has stated that while it has "offered various formulations of what constitutes a new rule, 'meaningfully for the majority of cases,' the

Teague definition of a new rule is the governing test. *Gilmore v. Taylor*, 113 S.Ct. 2112, 2116 (1993); *Butler v. McKellar*, 494 U.S. 407, 412 (1990). Thus, consistent with principles of comity and finality, the new rule doctrine "validates reasonable, good-faith interpretations of existing precedents made by state courts even if they are shown to be contrary to later decisions." *Butler*, 494 U.S. at 414. *See also Saffle v. Parks*, 494 U.S. 484, 488 (1990). So long as a decision "was susceptible to debate among reasonable minds" at the time the prisoner's conviction became final, it constitutes a new rule under *Teague*. *Graham v. Collins*, 113 S.Ct. 892, 902 (1993); *Butler*, 494 U.S. at 414.

In resolving "the determinative question [as to] whether reasonable jurists" who "survey[ed] the legal landscape as it then existed" at the time the prisoner's case became final would have been obligated to accept his claim, *Graham*, 113 S.Ct. at 898, 903, this Court has relied upon the existence of federal and state authority adverse to the prisoner's position as a basis for invoking *Teague*. *See, e.g., Caspari v. Bohlen*, 114 S.Ct. 948, 955-956 (1994); *Butler*, 494 U.S. at 414. This Court even has cited decisions which were against the weight of authority and *dissenting* opinions in its own earlier cases to hold that *Teague* barred review of a federal habeas claim. *See Sawyer v. Smith*, 497 U.S. 227, 236-241 (1990). Further, even cases decided after a prisoner's conviction has become final bear upon the *Teague* inquiry, so long as they were decided adversely to him. *See Bohlen*, 114 S.Ct. at 956; *Gilmore*, 113 S.Ct. at 2117; *Graham*, 113 S.Ct. at 900. *See also Lockhart v. Fretwell*, 113 S.Ct. 838 (1993). Finally, in considering a challenge to the constitutionality of jury

instructions, this Court has viewed the long-standing state practice of using such instructions as "strong evidence of the reasonableness of the interpretations given existing precedent by state courts." *Gilmore*, 113 S.Ct. at 2119 n.3.

Particularly in light of *Gilmore v. Taylor*, petitioner cannot satisfy *Teague*'s threshold test. First, in both *Turner I* and *Turner II*, as well as in numerous other cases involving similar challenges to the statutory vileness predicate by other Virginia death row prisoners, the Fourth Circuit regularly has upheld the constitutionality of this factor, both on its face and/or as applied. *See Turner v. Williams*, 35 F.3d at 891-894; *Turner v. Bass*, 753 F.2d at 350-353; *Jones v. Murray*, 976 F.2d 169 (4th Cir. 1992); *Bunch v. Thompson*, 949 F.2d 1354, 1366-1367 (4th Cir. 1991), *cert. denied*, 113 S.Ct. 20 (1992); *Jones v. Murray*, 947 F.2d 1106, 1116-1119 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1591 (1992); *Clozza v. Murray*, 913 F.2d 1092, 1105 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 1123 (1991); *Boggs v. Bair*, 892 F.2d 1193, 1196-1197 (4th Cir. 1989), *cert. denied*, 497 U.S. 1043 (1990); *Smith v. Procunier*, 769 F.2d 170, 173-174 (4th Cir. 1985), *aff'd*, 477 U.S. 527 (1986); *Briley v. Bass*, 750 F.2d 1238, 1242-1246 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985). *See also Washington v. Murray*, 952 F.2d 1472, 1480 (4th Cir. 1990).

Similarly, the Supreme Court of Virginia consistently has rejected arguments much like Turner's. *See, e.g., Mickens v. Commonwealth*, 247 Va. 395, 403, 442 S.E.2d 678, 683-684, *vacated on other grounds*, 115 S.Ct. 307 (1994); *Stewart v. Commonwealth*, 245 Va. 222, 229, 427 S.E.2d 394, 399-400, *cert. denied*, 114 S.Ct. 143 (1993); *Mueller v. Commonwealth*, 244 Va. 386, 393, 422 S.E.2d 380, 385 (1992),

cert. denied, 113 S.Ct. 1880 (1993); *Spencer v. Commonwealth*, 238 Va. 563, 569, 385 S.E.2d 850, 853-854 (1989), *cert. denied*, 493 U.S. 1093 (1990); *Hoke v. Commonwealth*, 237 Va. 303, 305, 377 S.E.2d 595, 597, *cert. denied*, 491 U.S. 910 (1989); *Gray v. Commonwealth*, 233 Va. 313, 320-321, 358 S.E.2d 157, 161, *cert. denied*, 484 U.S. 873 (1987). This uninterrupted line of state and federal decisions upholding the constitutionality of Virginia's vileness circumstance demonstrates the applicability of *Teague* to this case.

Finally, less than four months ago, this Court rejected an almost identical attack upon Virginia's vileness predicate in *Breard v. Virginia*, 115 S.Ct. 1442 (1994). Likewise, this Court regularly has denied review of similar vileness arguments raised by other Virginia death row prisoners. *See, e.g., Stewart v. Virginia*, 114 S.Ct. 143 (1993); *Satcher v. Virginia*, 113 S.Ct. 1319 (1993); *George v. Virginia*, 112 S.Ct. 1591 (1992). Consequently, *Teague* mandates rejection of Turner's petition. *See Maggio v. Williams*, 464 U.S. 46, 51-52 (1983) (significance of prior denials of certiorari on same issue).

II. PETITIONER'S VILENESS ARGUMENT RAISES NO FEDERAL CONSTITUTIONAL ISSUE AND OTHERWISE IS NOT REVIEWABLE IN LIGHT OF HIS PROCEDURAL DEFAULT.

Turner asserts that Virginia's vileness circumstance is facially unconstitutional under *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Godfrey v. Georgia*, 446 U.S. 420 (1980). Further, the jury instruction on the "depravity of mind" component of the vileness factor, which the trial court

incorporated from the limiting language adopted in *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979), allegedly was too unclear to channel the sentencer's discretion by objective standards and genuinely to narrow the class of death-eligible murderers. Finally, the Supreme Court of Virginia on direct appeal in death penalty cases supposedly has compounded these claimed deficiencies by applying the vileness factor in an arbitrary, overly broad fashion.

Lowenfield v. Phelps, 484 U.S. 231 (1988), and *Tuilaepa v. California*, 114 S.Ct. 2630 (1994), demonstrate that Turner's arguments implicate no constitutional guarantees. In *Lowenfield*, this Court made clear that the only constitutional significance of statutory aggravating factors is to narrow the class of death-eligible murderers. This narrowing function, however, may be accomplished equally as well in the guilt phase. That is, a state's definition of capital murder may be sufficiently restrictive that its statutory aggravating factors in the penalty phase are constitutionally superfluous. Thus, in *Lowenfield*, this Court upheld a Louisiana death penalty even though the sole aggravating circumstance found in the sentencing stage repeated one of the elements of the capital crime. *See also California v. Ramos*, 463 U.S. 992, 1000 n.11 (1983); *Zant v. Stephens*, 462 U.S. 862, 869 (1983); *Jurek v. Texas*, 428 U.S. 262, 270-271 (1976).

In *Tuilaepa*, this Court stated that the Eighth Amendment addresses two primary concerns in capital sentencing schemes – the "eligibility decision" and the "selection decision." 114 S.Ct. at 2634. Turner's petition deals only with the former; a defendant constitutionally is eligible for the death penalty only upon conviction for an offense

for which it is an appropriate punishment. Eligibility for the death penalty requires the trier of fact to "convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase. The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)." *Tuilaepa*, 114 S.Ct. at 2634-2635 (citations omitted). Moreover, the aggravating circumstance cannot apply to every person convicted of murder but only to a subclass and, further, it cannot be unconstitutionally vague. 114 S.Ct. at 2635.

Turner was convicted of premeditated murder in the commission of robbery while armed with a deadly weapon. Consistent with *Lowenfield* and *Tuilaepa*, Turner's conviction for capital murder, which effectively incorporated several aggravators, provided the constitutionally necessary narrowing function, wholly apart from the findings of the jury in the penalty phase or the Supreme Court of Virginia on direct appeal.[7] *See California v. Ramos*, 463 at 995 n.1, 1008 (jury's finding during guilt phase of capital murder trial of special circumstance that murder had been committed during robbery was determination that defendant was eligible for death penalty, thereby leaving it free to determine whether death was appropriate punishment). *See also Jurek v. Texas*, 428 U.S. at 265-266 n.1 (statutory scheme upheld wherein one of

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[7] In his petition, Turner virtually concedes as much: "*Every* murder defendant eligible for the death penalty in Virginia . . . has committed a crime that is, by definition, willful, deliberate and premeditated. *Every* death-eligible murder is a crime surpassing other willful, deliberate and cruel acts against another." (Pet. at 20; citations omitted; emphasis in original).

five capital murders was intentional murder in course of robbery); *Proffitt v. Texas*, 428 U.S. 242, 248-249 (1976) (death penalty scheme constitutional in which one aggravator was murder committed during robbery). Because the premeditated murder during the armed robbery which Turner was found to have committed applied only to a subclass of murderers and because this category of capital murder clearly was not vague, any constitutional imperatives concerning the eligibility decision were satisfied. *Tuilaepa*, 114 S.Ct. at 2635.[8]

Further, even if Turner's vileness claim raised a federal constitutional question, it is fundamental that this Court will not review a claim which the petitioner failed to preserve in the state courts. *See Springfield v. Kibbe*, 480 U.S. 257 (1987); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). *See also* U.S.S.Ct. R. 14.1(h) (petitioner must demonstrate that federal question "was timely and properly raised so as to give this Court jurisdiction to review the judgment.").

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[8] Furthermore, even if Virginia's vileness factor were unconstitutional, because Virginia is a non-weighing State, *see Swann v. Commonwealth*, 247 Va. 222, 236-237, 441 S.E.2d 195, 205, *cert. denied*, 115 S.Ct. 234 (1994), Turner would not be entitled to relief. That is, the aggravators found when he was convicted of capital murder during the commission of an armed robbery render this issue academic. *See Stringer v. Black*, 112 S.Ct. 1130, 1137 (1992) ("In a non-weighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty."). *See also Tuilaepa*, 114 S.Ct. at 2642 (in non-weighing State, "we have not subjected aggravating circumstances to a vagueness analysis."). (Blackmun, J., dissenting).

At the resentencing, Turner did not object to Instructions 10 and 11, which repeated verbatim the Supreme Court of Virginia's limiting definitions of "aggravated battery" and "depravity of mind." Thereafter, on direct appeal in *Turner II*, Turner did not attack the vileness factor as facially unconstitutional[9] or challenge the limiting construction of the aggravated battery and depravity of mind components of the vileness circumstance. (App. 1-17). Concerning the latter component, Turner asserted only that depravity of mind should be construed to mean "a degree of moral turpitude and psychical debasement that *far* surpasses that inherent in the definition of legal malice and premeditation." (App. 12). (Emphasis in original). Petitioner expressly conceded that Virginia's limiting construction of depravity of mind could potentially provide principled differentiation between capital and non-capital cases. (App. 11).

Finally, on direct appeal, Turner presented virtually no argument that the scope of proportionality review by the Supreme Court of Virginia in death penalty cases is generally inadequate. Nor did petitioner, upon the State Supreme Court's decision in *Turner II*, seek a rehearing challenging the review of his own death sentence. Instead, Turner argued that his conduct did not amount to depravity of mind or aggravated battery within the meaning of the vileness predicate. (App. 8-11). Turner relied upon the brutality reflected in other Virginia death penalty cases to argue that the facts here were not equally "vile." (App. 9-16).

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[9] In fact, the Supreme Court of Virginia noted as much in *Turner II*. *See* 234 Va. at 552, 364 S.E.2d at 488.

When petitioner raised the present claims in his state habeas appeal, the Supreme Court of Virginia dismissed them as partly repetitive of his arguments on direct appeal, and thus not reviewable under *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), and partly new, and thus defaulted under *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974). (App. 18-19). *See also Turner v. Williams*, 812 F. Supp. at 1411-1414. The State Supreme Court's dismissal order corresponded, without exception, to respondent's arguments in his brief in opposition concerning which grounds were repetitious, which were defaulted, and which were a mixture of the two. Thus, no less than in *Coleman v. Thompson*, 111 S.Ct. 2546 (1991), the Supreme Court of Virginia unambiguously found the present claim defaulted. Accordingly, this Court should not review petitioner's defaulted claim.

III. VIRGINIA'S STATUTORY VILENESS PREDICATE, BOTH FACIALLY AND AS APPLIED TO THE FACTS OF THIS CASE, IS CLEARLY CONSTITUTIONAL.

Petitioner's challenge to the vileness circumstance, even if reviewable, has no merit. Instruction No. 1 informed the jury in *Turner II* that for it to sentence Turner to death, it must find beyond a reasonable doubt at least one of the two statutory aggravating factors, including that petitioner's conduct "in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim." *Turner v. Williams*, 812 F. Supp. at 1400 n.25. Incorporating the Supreme Court of Virginia's limiting construction of the vileness factor,

Instruction No. 10, without objection, defined an aggravated battery as one "which qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder." *Turner v. Williams*, 35 F.3d at 891. Likewise, Instruction No. 11, again without objection, defined depravity of mind as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." *Id.* The jury sentenced Turner to death based on its finding that the murder was "outrageously and wantonly vile, horrible, and inhuman in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the murder. . . . " (App. 20).

Turner first asserts that, consistent with *Gregg v. Georgia*, Virginia's vileness circumstance is facially vague and must be suitably limited by jury instructions and appellate review to pass constitutional muster. In upholding Georgia's identical vileness criterion in *Gregg*, however, this Court stated: "[T]here is no reason to think that juries will not be able to understand" this phrase. 428 U.S. at 202 n.54.

Petitioner's reliance upon *Godfrey* is equally baseless. There, the prosecution specifically conceded the absence of "torture" and "aggravated battery," and the jury merely found "that the offense of murder was outrageously or wantonly horrible and inhuman." 466 U.S. at 428. There was "nothing in these words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Godfrey*, 446 U.S. at 428. Moreover, on direct appeal, the Georgia Supreme Court did not apply its own previous limiting

construction of the Georgia vileness factor. 446 U.S. at 429-432. Under these attendant circumstances, this Court held that the State Supreme Court had construed the vileness criterion too broadly. 446 U.S. at 432. *See also Turner v. Bass*, 753 F.2d at 350-353.

This Court made clear in *Tuilaepa* that "our vagueness review is quite deferential. . . . [A] factor is not unconstitutional if it has some 'common-sense core of meaning. . . . that criminal juries should be capable of understanding. . . . ' " 114 S.Ct. at 2635-2636. This Court's holding in *Arave v. Creech*, 113 S.Ct. 1534 (1993), reflects this deferential approach. In *Creech*, the trial court found as an aggravating factor that the petitioner had "by the murder . . . exhibited utter disregard for human life." 113 S.Ct. at 1539. On direct appeal, the Idaho Supreme Court affirmed this finding after applying its limiting construction of "utter disregard" to include "acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." 113 S.Ct. at 1539. This Court concluded that this limiting language adequately narrowed the class of murderers eligible for the death penalty.[10]

Consistent with *Tuilaepa* and *Creech*, the definition of "depravity of mind" given to the jury in *Turner II* was constitutionally sufficient. The State Supreme Court's

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[10] It is important to note that in sharp contrast to the case at bar, Idaho defined capital murder very broadly. 113 S.Ct. at 1542-1543. Thus, the aggravator at issue in *Creech* had overriding constitutional significance, unlike the vileness factor in *Turner II*.

limiting construction of this term stressed the aspects of a defendant's state of mind that distinguish him from an "ordinary murderer" in terms of malice and premeditation. This concept of extreme moral turpitude and debasement, like Arizona's "depraved" factor, *Walton v. Arizona*, 497 U.S. 639, 655 (1990) ("relishes the murder, evidencing debasement or perversion"), and Idaho's "utter disregard" circumstance, *Creech*, 113 S.Ct. at 1541 ("cold blooded" and "pitiless"), adequately guides the sentencer even though the definition may be not "susceptible to mathematical precision." *Walton*, 497 U.S. at 655. As in *Creech*, the depravity of mind component focused on the objective issue of Turner's state of mind rather than the "pejorative adjectives . . . that describe[d his] crime as a whole. . . . " 113 S.Ct. at 1541. Viewing this term in conjunction with the specific and narrow "torture" and "aggravated battery" components, the jury in *Turner II* clearly understood that it did not have unfettered discretion to impose the death penalty.

In *Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991), the Fourth Circuit specifically rejected the death row prisoner's argument that the *Smith* limiting construction of "depravity of mind" was unintelligible to an average juror. 947 F.2d at 1119. This Court should not second guess the Fourth Circuit's conclusion. *See Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (deference warranted because lower federal courts "are better schooled in and more able to interpret the law of their respective States").

Moreover, wholly apart from the adequacy of the jury instructions on the vileness factor, the State Supreme Court's review of Turner's death sentence in *Turner II* served to accomplish the narrowing of the death-eligible

class of murderers. *See Walton v. Arizona*, 497 U.S. at 653-655; *Coleman v. Thompson*, 895 F.2d 139, 146-147 (4th Cir. 1990). The State Supreme Court's findings concerning the vileness predicate were rational and supported by the evidence. *See Lewis v. Jeffers*, 497 U.S. 764, 780-783 (1990).

Turner's complaints concerning the appellate review undertaken by the Supreme Court of Virginia, both in this case and in death penalty cases generally, is belied by his own prior characterization of such review. In the Fourth Circuit, Turner argued that the facts of this case bore "no resemblance to the remarkably violent behavior typical in death penalty cases under the [Virginia] vileness factor" or "the pattern of extraordinary brutality typical of vileness cases. . . . " (App. 21-25). The Fourth Circuit noted as much in rejecting Turner's claim that Virginia imposes the death penalty arbitrarily and capriciously. *Turner v. Williams*, 35 F.3d at 893 n.20.

Moreover, this Court made clear in *Creech* that the type of complaints advanced by Turner against the Supreme Court of Virginia's appellate review of death sentences is inapposite. There, this Court stated:

> That the Idaho courts may find first-degree murderers to be 'cold-blooded' and 'pitiless' in a wide range of circumstances is unsurprising. It is also irrelevant. . . . We did not undertake a comparative analysis of state court decisions in *Walton*. . . . Under our precedents, a federal court may consider state court *formulations* of a limiting construction to ensure that they are consistent. But our decisions do not authorize review of state court cases to determine whether

> a limiting construction has been *applied* consistently.

113 S.Ct. at 1543, 1544 (emphasis in original).

No less than the Idaho Supreme Court in *Creech*, the Supreme Court of Virginia consistently has invoked and applied the limiting construction of "depravity of mind" in death penalty cases. *See, e.g., Stewart v. Commonwealth*, 245 Va. 222, 245-247, 427 S.E.2d 394, 409, *cert. denied*, 114 S.Ct. 143 (1993); *Thomas v. Commonwealth*, 244 Va. 1, 25, 419 S.E.2d 606, 619-620, *cert. denied*, 113 S.Ct. 421 (1992). The Supreme Court of Virginia's determination in *Turner II* that the Commonwealth's evidence proved the depravity of mind component of the vileness factor under the *Smith* limiting definition was entirely consistent with its approach in death penalty cases generally. In this regard, the Fourth Circuit specifically upheld the adequacy of the appellate review undertaken by the State Supreme Court in *Turner II*. *See also Jones v. Murray*, 947 F.2d at 1118.

Finally, this Court regularly has denied certiorari review on almost identical attacks upon Virginia's vileness circumstance. (See page 10 of this Brief). Thus, as in *Maggio v. Williams*, where this Court refused to stay an execution in Louisiana to consider a proportionality review argument much like those unsuccessfully raised by other Louisiana prisoners, this Court's previous denials of certiorari are "ample evidence that [it does] not believe" that the present petition justifies the granting of certiorari. 464 U.S. at 51-52.

IV. PETITIONER'S INEFFECTIVE COUNSEL CLAIM IS TOO FACT-SPECIFIC AND TOO INSUBSTANTIAL TO WARRANT REVIEW BY THIS COURT.

Petitioner complains that trial counsel unreasonably chose not to present mitigating evidence at the resentencing proceeding which he had promised the jury in his opening statement. Further, Turner attacks this failure, in part, as the product of trial counsel's allegedly inadequate pretrial investigation and challenges counsel's failure to introduce a case in mitigation as unreasonably foregoing "[c]ompelling" mitigating evidence. (Pet. at 24).

This argument clearly is inadequate to warrant this Court's discretionary review. Certainly, Turner offers no special or important reasons for the granting of certiorari. Moreover, the Court does "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). *See also Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.); U.S.S.Ct. R. 10.1. Thus, petitioner's complaints against counsel, which focus upon the adequacy of their pretrial investigation and reasonableness of their decision to rest without putting on mitigating evidence, are too fact-specific to justify the granting of certiorari.

Further, Turner's contention that certiorari is appropriate to resolve an alleged conflict between various circuits concerning whether the failure to present evidence recited in the opening statement is *per se* ineffective representation has no merit. Petitioner's reliance upon *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988), is misplaced. (Pet.

at 23-24).[11] As the Fourth Circuit pointed out in *Turner v. Williams*, 35 F.3d at 903-904, the First Circuit in *United States v. McGill*, 11 F.3d 223 (1st Cir. 1993), clarified its prior holding in *Anderson*, holding that "the determination of inefficacy [concerning counsel's failure to present a promised witness] is necessarily fact-based." 11 F.3d at 227. Thus, the alleged conflict between the lower courts concerning the impact of an attorney's failure to present promised evidence is non-existent.[12]

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[11] A cursory review of the other cases cited by Turner readily establishes that none of them dispensed with the two-pronged test for determining an ineffective counsel claim established in *Strickland v. Washington*, 466 U.S. 668 (1984). For example, in *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990), the Seventh Circuit applied *Strickland* and concluded that "[u]nder the circumstances" counsel's "overall performance" was constitutionally ineffective representation. 894 F.2d at 878. *See also McAleese v. Mazurkiewicz*, 1 F.3d 159, 167 (3rd Cir. 1993) (failure to produce evidence promised in opening statement was "not necessarily ineffective"); *United States v. Washington*, 840 F. Supp. 562, 576 (N.D. Ill. 1993) ("based on the facts," counsel's failure to present witness mentioned in opening statement was not ineffective under either prong of *Strickland*); *People v. Ortiz*, 224 Ill. App. 3d 1065, 1072, 586 N.E.2d 1384, 1389 (1992) (defense counsel's failure to present promised witness, which resulted in part from his misunderstanding concerning proper scope of cross-examination and redirect examination, was ineffective under *Strickland* test).

[12] Even if *Anderson* still was the First Circuit's view on this issue, it would be too slender a reed to warrant the granting of certiorari. As then-Judge Breyer noted in his dissent in *Anderson*, the majority holding which presumed prejudice as a matter of law cannot be reconciled with *Strickland*'s fact-based inquiry. 858 F.2d at 22 (Breyer, J., dissenting).

Finally, both the Fourth Circuit and the district court carefully reviewed the state record, including the lengthy findings of fact of the state habeas circuit court, and concluded that defense counsel's pretrial investigation of mitigating evidence had been effective and that their decision to rest at the resentencing without putting on a case in mitigation had been reasonable. 35 F.3d at 894-904; 812 F. Supp. at 1428-1432. Likewise, both lower courts properly concluded that Turner had not been prejudiced under *Strickland* by counsel's actions. 35 F.3d at 896-898; 812 F. Supp. at 1429-1432. The record overwhelmingly establishes the thoroughness of defense counsel's pretrial investigation as well as the reasonableness of their decision to rest without formally introducing mitigating evidence; thus Turner has provided no justification for this Court's review of his unremarkable *Strickland* claim.

CONCLUSION

Petitioner's arguments against the vileness circumstance raise no federal constitutional issue, are not cognizable under the new rule and procedural default doctrines, and otherwise advance no significant federal constitutional question. Likewise, petitioner's garden-variety ineffective counsel contention raises nothing more than a routine *Strickland* claim. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 870554

WILLIE LLOYD TURNER,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

1. Is the Virginia death penalty statute unconstitutionally vague and overbroad, in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

2. Was the trial court permitted to sentence Appellant Willie Lloyd Turner to death after remand for penalty phase error?

3. Does this Court provide adequate appellate review of death sentences?

4. Is Virginia's death penalty statute applied in a racially discriminatory fashion against blacks who have killed whites?

5. Did the trial court err in refusing to exclude juror Samuel Lambert for cause?

6. Should the trial court have allowed evidence, argument or instruction concerning parole eligibility?

7. Should the trial court have instructed the jury as to the "vileness" aggravating circumstance, or as to the "aggravated battery" or "depravity of mind" prongs of that aggravating circumstance?

8. Did the trial court err in refusing Appellant's proposed instructions 1A, 1B, 1C, 1D and 1E?

9. Should the trial court have allowed Appellant to argue to the jury that the Appellant would be sentenced to die in the electric chair, after the prosecution had referred to electrocution both in *voir dire* and earlier in its own argument?

10. Is the death sentence in this case disproportionate, or was it imposed under the influence of passion or prejudice?

ASSIGNMENTS OF ERROR

1. The trial court erred in denying Appellant's Motion for a Life Sentence, which motion was based upon the following allegations:

a. That the Virginia death penalty statute is unconstitutionally vague and overbroad in its definition of aggravating circumstances, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

b. That the trial court could not resentence Turner to death, according to this Court's decision in *William Patterson v. Commonwealth.*

c. That the failure of the Virginia courts to afford adequate appellate review of death sentences means that death sentences are being imposed in Virginia in an arbitrary and capricious manner, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

d. The Virginia death penalty statute is applied in a racially discriminatory fashion against people like Appellant, a black man who killed a white man.

2. The trial Court's refusal to exclude juror Samuel Lambert for cause violated Appellant's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution to have an impartial jury capable of

deciding whether to impose the death sentence free of any arbitrary or prejudicial factors.

3. The trial court erred in refusing to allow evidence or argument concerning parole eligibility, resulting in arbitrary and capricious infliction of the death sentence, in violation of Appellant's Eighth and Fourteenth Amendment rights.

4. The trial court erred in refusing to grant Defendant's proposed instructions 1A, 1B, 1C, 1D and 1E, as a result of which the death setnence [sic] was imposed against Appellant in an arbitrary and capricious manner, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

5. The trial court erred in refusing to allow Appellant to make argument concerning the fact that the Appellant would be sentenced to die in the electric chair, a restriction which, after the prosecution had referred to electrocution both in *voir dire* and earlier in argument, violated due process and resulted in the death sentence being imposed arbitrarily and capriciously, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

6. The trial court erred in allowing the jury to be instructed on the issue of aggravated battery, depravity of mind or the "vileness" criterion.

7. The death sentence in this case is disproportionate, and constitutes cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

* * *

III.

THE MURDER OF JACK SMITH WAS NOT "VILE" WITHIN ANY CONSTITUTIONAL MEANING OF THE VIRGINIA CAPITAL SENTENCING STATUTE.

The jury on resentencing based the imposition of the death sentence only on the vileness of the crime, and did not make a finding of future dangerousness. Judge Godwin had instructed the jury on both aggravating circumstances, over the objection of the defense,[2] and had instructed the jury as to both the aggravated battery and the depravity of mind prongs of the vileness test.

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[2] This argument encompasses four objections:

1. The Virginia death penalty statute in general, and the "vileness" criterion in particular, are unconstitutionally vague and overbroad in that they do not channel the jury's discretion, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

2. The application of the Virginia death penalty statute to the facts of this case to support the imposition of this death sentence renders the statute unconstitutional as applied.

3. Under this Court's precedents, Willie Turner cannot be sentenced to death for the reasons given by the jury.

4. If this Court fails to reverse the jury's verdict, the Court will have failed to provide adequate appellate review of the propriety of the death sentence.

These issues are very closely interrelated, and will not be argued in separate, numbered paragraphs or arguments.

A. The Language Of The "Vileness" Criterion Is Intrinsically Vague And Overbroad, And Can Be Constitutional Only If The State Appellate Court Restricts Its Application To Cases "At The Core."

Virginia's "vileness" criterion is identical to Georgia's §27-2534.1(b)(7), which was approved by the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The Court there rejected the argument that §(b)(7) was so overbroad that it could support the death penalty in any murder case.

> It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction. In only one case has it upheld a jury's decision to sentence a defendant to death when the only statutory aggravating circumstance found was that of [§(b)(7)], see *McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974), and that homicide was a horrifying torture-murder.

428 U.S. at 201 (Stewart, Powell, and Stevens, JJ.) The Court went on to praise the Georgia Supreme Court for the careful review that it was giving to death sentences, noting that that court had held that §27-2534.1(b)(1) was impermissibly vague, *see Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (1976), and that the Georgia Supreme Court had reversed a jury's finding that the defendant had created a "great risk of death to more than one person" when the victim had simply been kidnapped in a parking lot. *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975).

Four years later, the United States Supreme Court reviewed the performance of the Georgia Supreme Court in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). In response to defense claims that the Georgia courts' application of §(b)(7) to Godfrey's case invalidated the entire statutory scheme, the United States Supreme Court instead reiterated its support for the Georgia Supreme Court's narrowing constructions, but found that the failure of the court to apply those narrowing constructions to Godfrey's case required that the death sentence be set aside.

> In past cases the State Supreme Court has apparently understood this obligation as carrying with it the responsibility to keep §(b)(7) within constitutional bounds. Recognizing that "there is a possibility of abuse of [the §(b)(7)] statutory aggravating circumstance," the court has emphasized that it will not permit the language of that subsection simply to become a "catchall" for cases which do not fit within any other statutory aggravating circumstance. *Harris v. State*, 237 Ga. 718, 732, 230 S.E.2d 1, 10 (1976). Thus, in exercising its function of death sentence review, the court has said that it will restrict its "approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core." *Id.*, at 733, 230 S.E.2d, at 11.

446 U.S. at 429.

Godfrey is cited in support of many different propositions, many of them not supported by a close reading of the case. For example, *Godfrey* does not stand for the

proposition that one who kills his victims instantaneously, with one gunshot, can never be sentenced to death under Virginia's vileness criterion; *Godfrey* says only that such a crime is not vile under Georgia law, and that the failure of the Georgia courts to apply Georgia law can constitute a violation of the Eighth Amendment.

Likewise, we do not argue here that *Godfrey* requires this Court to conclude that Turner's crime was not vile. The significance of *Godfrey* is that it reiterates the importance of clear jury instructions and critical appellate review to make sure that such an intrinsically vague test as that in the "vileness" test does not become an unprincipled "catchall." Virginia is not constitutionally required to construe the "aggravated battery," "depravity of mind," and "torture" prongs *in pari materia*, as did the Georgia courts, but Virginia is constitutionally required to restrict the use of its vileness test to cases that "lie at the core."

B. Turner's Case Does Not "Lie At The Core" Of Death Penalty Cases.

1. This is not a case involving depravity of mind.

When this Court reviewed Turner's death sentence in 1980, the Court found that the aggravated battery criterion was supported, but did not approve the finding of depravity of mind. *Turner v. Commonwealth*, 221 Va. 513, 527, 273 S.E.2d 36 (1980). No additional evidence concerning the crime was adduced at this hearing, so the trial court should have been bound by this Court's earlier

opinion on the subject. Turner's mental state exhibited a degree of psychical debasement equal to that inherent in any capital murder under Virginia law, but the degree of "psychical debasement" did not surpass that present in any malice murder. There was no evidence that Turner had planned the murder; he just wanted to rob the store. That distinguishes Turner from, for example, Linwood Briley, of whom it can be said that not only the robbery but also the murder had been thought out ahead of time. *L. E. Briley v. Commonwealth*, 221 Va. 532, 273 S.E.2d 48 (1980). He did not kill Jack Smith on his way out of the store, his purpose having been achieved. *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985). He did not obtain sexual gratification from what he had done. *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983).

In this Court's other "depravity of mind" cases, the depravity of mind and malice far transcend that found in the case of the frustrated jewelry store robbery. These are cases in which the jury could logically conclude that the defendant had formed the intent to kill before he began his criminal activity – cases in which the act of robbery was complete and the getaway sure, but where the defendant took the time to make sure that he killed the victim. *See, e.g., L. E. Briley v. Commonwealth*, 221 Va. 532, 273 S.E.2d 48 (1980); *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985).

There is no evidence in this case that Turner planned, with a malice surpassing that inherent in the ordinary legal definition of murder, to kill Jack Smith. The evidence is that he killed Jack Smith out of panic and anger and frustration, a situational response rather than a long-thought-out response. He clearly premeditated, and with

malice intended to kill Jack Smith, but that was a decision made with police sirens wailing in the background in the middle of the robbery, rather than a decision made before the robbery started, or after it was essentially complete.

It was error to instruct the jury on depravity of mind.

2. Although this case appears to meet the standards set forth in earlier case law for aggravated battery, those standards should be tightened.

Under the precedents of this Court, Turner's crime would seem to constitute an "aggravated battery". The 1980 opinion of this Court seems to base the finding of aggravated battery on the number of gunshots and the fact that Jack Smith did not die instantaneously. 221 Va. at 527; see also *Watkins, supra,* 331 S.E.2d at 437.

Virginia case law since 1977 has many cases of vileness that are truly "at the core," to use the phrase sanctioned by the United States Supreme Court. *See, e.g., Smith v. Commonwealth,* 219 Va. 455, 248 S.E.2d 135 (1978) (rape-murder where victim was choked, stabbed and drowned); *Waye v. Commonwealth,* 219 Va. 683, 251 S.E.2d 202 (1979) (rape-murder, 42 stab wounds and victim beaten beyond recognition); *Mason v. Commonwealth,* 219 Va. 1091, 254 S.E.2d 116 (1979) (rape-murder, victim hit in head, abdomen with axe, sexually abused with axe, nailed to chair and set afire); *Fitzgerald v. Commonwealth,* 223 Va. 615, 292 S.E.2d 798 (1982) (rape-robbery-murder, victim cut at least 184 times); *Pruett v. Commonwealth,* 232 Va. 266, 351 S.E.2d 1 (1986) (rape-murder with at least 29 stab wounds).

In each of the above cases, and other cases that are truly "at the core," the physical abuse to the victim was *far* beyond the minimum necessary to accomplish a murder – enough so that a jury could reasonably conclude that the defendant *enjoyed* what he was doing.

3. This Court must adopt stricter standards for defining and applying the vileness aggravating circumstance.

This Court has made a start to complying with *Gregg* and *Godfrey* by formulating standards that could afford a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433. The definitions of "aggravated battery" and "depravity of mind" enunciated in *Smith* can, if strictly applied, provide that principled distinction. The important factor in applying either definition is the degree to which an aggravated battery must exceed the minimum battery necessary to kill, or the degree to which the killer's mind must exceed that malice inherent in first-degree murder. The United States Supreme Court has suggested that, to deserve the death penalty for vileness alone, the killer should display a consciousness *materially* more depraved than that of any person guilty of murder. *Godfrey, supra,* at 432. A bright-line rule that one gunshot means a life sentence but two gunshot wounds means a death sentence trivializes the decision. Two gunshots do not necessarily "reflect a consciousness materially more 'depraved' than" the use of a single bullet. *Godfrey, supra,* at 432.

This Court should make clear that an aggravated battery must be one which, qualitatively and quantitatively, is *much more vile than* the minimum necessary to accomplish the act of murder, and that "depravity of mind" is a degree of moral turpitude and psychical debasement that *far* surpasses that inherent in the definition of legal malice and premeditation.

* * *

VIII.

IMPOSITION OF THE DEATH SENTENCE IN THIS CASE WOULD BE DISPROPORTIONATE TO THE CRIME, IN VIOLATION OF THE EIGHTH AMENDMENT, AND WOULD BE EVIDENCE OF PASSION OR PREJUDICE.

The jury did not find that Willie Turner would be dangerous in the future, though they found that the crime was outrageously or wantonly vile, horrible and inhuman in that it involved depravity of mind and aggravated battery. When last this Court considered the proportionality of a death sentence on Willie Turner, it had both aggravating circumstances to consider. Now the question is whether juries in Virginia typically impose the death sentence on a person like Willie Turner.

The starting point for the analysis must be a comparison with other cases in which only vileness was found.

It is obvious, after reviewing the cases, that Turner's crime was by far the least vile of any "vileness only" cases to come to this Court.

1. *Waye v. Commonwealth*, 219 Va. 683, 251 S.E.2d 202, *cert. denied*, 444 U.S. 924 (1979) (rape-murder, 42 stab wounds, victim beaten beyond recognition).

2. *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049 (1980) (murder for hire, victim shot five times with hollow-point bullets at close range, murder planned for days, celebrated murder with girlfriend).

3. *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103 (1980) (robbery-murder, defendant choked victim, slammed her head against floor with such force that five teeth were scattered around the house).

4. *Justus v. Commonwealth*, 222 Va. 667, 283 S.E.2d 905 (1981), *cert. denied*, 455 U.S. 983 (1982) (rape-murder of pregnant woman, victim shot twice in the face and once in the back of the head at close range).

5. *Whitley v. Commonwealth*, 223 Va. 66, 286 S.E.2d 162, *cert. denied*, 459 U.S. 882 (1982) (robbery-murder, death caused either by stabbing or strangulation with rope, which was followed by jamming umbrellas into rectum and vagina).

6. *Fitzgerald v. Commonwealth*, 223 Va. 615, 292 S.E.2d 798 (1982), *cert. denied*, 459 U.S. 1228 (1983) (rape-robbery-murder, victim cut with both machete and knife, at least 184 times).

7. *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271, *cert. denied*, 464 U.S. 977 (1983) (robbery-murder, murder and robbery planned days in advance, defendant shot victim in head, had sexual orgasm, watched her die

on the floor while he drank her wine and listened to music, garrotted her and then hanged her from doorknob with scarf).

8. *LeVasseur v. Commonwealth*, 225 Va. 564, 304 S.E.2d 644 (1983), *cert. denied*, 464 U.S. 1063 (1984) (robbery-murder, victim stabbed at least 43 times with ice pick and carving fork, back of head crushed, defendant tried to burn body).

9. *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984), *cert. denied*, 472 U.S. 1012 (1985) (double robbery-murder, one victim killed with one shot at close range to head, other victim tied up, shot at point-blank range in face, doused with accelerant, set afire, locked in closet, death from smoke inhalation).

10. *Washington v. Commonwealth*, 228 Va. 535, 323 S.E.2d 577 (1984) (rape-murder, victim raped, stabbed 38 times, left to bleed to death, all in the presence of her two children).

11. *Boggs v. Commonwealth*, 229 Va. 501, 331 S.E.2d 407 (1985) (robbery-murder, victim hit with heavy metal bar six times in head, several times in neck, death caused by repeated stabs, one of which finally punctured the heart).

12. *Wise v. Commonwealth*, 230 Va. 322, 337 S.E.2d 715 (1985) (robbery-murder, victim beaten, skull fracture, three fingers broken, flesh torn from face, gunshot to head, shotgun blast to chest, death came from drowning in outdoor toilet).

13. *Pruett v. Commonwealth*, 232 Va. 266, 351 S.E.2d 1 (1986) (rape-robbery-murder, victim tied up, stabbed 29 times).

14. *Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352 (1987) (robbery-murder, victim choked into unconsciousness, put in trunk of car, driven around, pulled out, kicked in face, defendant then threw knife deep into victim's chest twice).

The only case in the above list that is even close to *Turner* in the nature of the battery is *Clark* (where five hollow-point bullets were used), but Clark's depravity of mind was far greater – his was a murder for hire.

It is useful to narrow down even further the class of comparable cases to robbery-murders where only vileness was found. That class of cases consists of *Whitley, Bunch, LeVasseur, Boggs, Wise,* and *Correll,* all of which are cases that show a true desire to torture – the defendant went out of his way to mutilate the body. Interestingly, none of the robbery-murders where only vileness was found is a case in which the victim was a store operator. Only in *Correll,* where the defendant told a friend that they had "killed a faggot for the car," does robbery or larceny seem to have been the primary motive; in each of the other five, it seems apparent that the primary motive was murder, and the fact that property was taken was secondary.

The standard "holdup and murder" cases apparently receive the death sentence only if both aggravating circumstances are found, and usually only if more than one person is killed. *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979); *Edmonds v. Commonwealth*, 229 Va. 303,

329 S.E.2d 807 (1985); *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985); *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985).

It appears that Virginia juries draw a distinction between the street robbery and the robbery in the home. Robberies in the home are much more readily punished by death, wehreas [sic] robberies from stores are not.

Perhaps the case that is the closest to *Turner* on its facts is *Ball v. Commonwealth*, 221 Va. 754, 273 S.E.2d 790 (1981), in which Ball's conviction was reversed because he committed only an attempted robbery. Ball tried to hold up a store, but the Assistant Manager refused to give him any money. A struggle ensued, during which three or four shots were fired from Ball's pistol. The Assistant Manager died of his wounds. Ball testified that he had gone to the store intending to rob, but not to kill. The jury gave Ball a life sentence.

Another robbery-murder resulted in a capital murder conviction and a life sentence. in [sic] *Simpson v. Commonwealth*, 227 Va. 557, 318 S.E.2d 386 (1984), the jury sentenced Simpson to life for robbing and fatally stabbing a cab driver. Again, money, not murder, seemed to be the motive; Simpson had been armed with a sawed-off shotgun (like Turner had been), but used a knife instead as he stole the driver's money.

Virginia juries do not customarily return a death sentence for a robbery-murder such as the one at issue here. Willie Turner's death sentence should be overturned as disproportionate to the crime.

CONCLUSION

For the reasons stated above, Willie Turner's death sentence should be vacated.

WILLIE LLOYD TURNER

By Counsel

/s/ J. Lloyd Snook, III
J. Lloyd Snook, III
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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond, on Tuesday the 30th day of April, 1991.

Willie Lloyd Turner, Appellant,

against Record No. 901335
Circuit Court No. CL-141-88 (H.C.)

David Williams, Warden,
Powhatan Correctional Center, Appellee.

From the Circuit Court of Southampton County

Upon review of the record and consideration of the petition for appeal filed herein, the brief in opposition and the appellant's reply brief filed in response thereto, the Court finds there is no reversible error in the judgment appealed from. Applying the rule in *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), to petitioner's allegations numbered IV, VI, X, and XII in his petition for writ of habeas corpus, and to the extent allegations numbered VII, VIII, XIV, XV, and XVI in his petition for writ of habeas corpus advance matters not asserted on directed appeal; and, applying the rule in *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), to allegations numbered VII, VIII, XIV, XV, and XVI in his petition for writ of habeas corpus to the extent that they advance matters asserted on direct appeal, the petition for appeal is denied for reasons of procedural default. *Harris v. Reed*, 389 [sic] U.S. 255 (1989).

Finding no merit in petitioner's allegations of ineffective assistance of counsel, the Court refuses the petition for appeal as to those allegations. *Strickland v. Washington*,

466 U.S. 668 (1984). The petitioner's remaining allegations are dismissed as meritless.

The said circuit court shall allow court-appointed counsel a total fee of $300 plus their costs and necessary direct out-of-pocket expenses.

A Copy,

Teste:
David B. Beach, Clerk

By: /s/ Illegible
Deputy Clerk

* * *

THE CLERK: "We, the jury on the issues joined, the defendant having been found guilty of capital murder in the commission of a robbery, having unanimously found that the conduct in committing the offense is outrageous and wantonly vile, horrible, and inhuman in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the murder, [p. 550] and having considered the evidence in mitigation of the offense, unanimously fix the punishment at death." Signed by the foreman, William Powers, III.

* * *

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

RECORD NO. 93-4001

WILLIE LLOYD TURNER,

Petitioner/Appellant,

v.

DAVID A. WILLIAMS,
Warden, Powhatan Correctional Center,

Respondent/Appellee.

BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

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* * *

which was considerably more violent than the crime in Petitioner's sentencing. Yet each of these defendants was sentenced to life imprisonment while Petitioner received a capital sentence solely on the basis of the vileness of the crime. In fact, there is no legitimate basis for distinguishing Petitioner's case from those in which the defendants received the lesser sentence.

Furthermore, the Commonwealth cannot justify the imposition of the death penalty on the basis that Petitioner's case resembles other crimes for which Virginia juries generally approve capital punishment. The crime in this case bears no resemblance to the remarkably violent behavior typical in death penalty cases under the vileness factor.[19] In fact, the

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[19] To date, approximately 42 capital cases in Virginia have involved the vileness aggravating factor. The vast majority of these cases have involved fact patterns demonstrating significantly greater brutality than Petitioner's actions. *See, e.g., George v. Commonwealth*, 242 Va. 264, 411 S.E.2d 12 (1991), *cert. denied*, 112 S. Ct. 1591 (1992) (defendant sodomized child victim and used stun gun on victim's penis); *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227, *cert. denied*, 112 S. Ct. 386 (1991) (defendant abducted victim, stripped her, beat her, and sexually assaulted her before killing her by crushing her head in four places with large rock); *Stockton v. Commonwealth*, 241 Va. 192, 402 S.E.2d 196, *cert. denied*, 112 S. Ct. 280 (1991) (defendant shot victim and cut off his hands at the wrists while victim still alive); *Bennett v. Commonwealth*, 236 Va. 448, 374 S.E.2d 303 (1988), *cert. denied*, 490 U.S. 1028 (1989) (over extended period, bound victim suffered repeated blows to head and face, was stabbed four times and strangled); *Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352, *cert. denied*, 482 U.S. 931 (1987) (defendant choked victim, robbed him, kicked him in face several times and used unconscious body as target for knife-throwing); *Wise v. Commonwealth*, 230 Va. 322, 337 S.E.2d 715 (1985), *cert. denied*, 475 U.S. 1112 (1986) (defendant struck victim's head

Virginia Supreme Court acknowledged this fact when reviewing Petitioner's case. 364 S.E.2d at 490.

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repeatedly, broke three of victim's fingers, tore flesh from nose and forehead, shot victim in eyeball, threw victim in outdoor toilet and fired shotgun in victim's chest); *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815, *cert. denied*, 474 U.S. 865 (1985) (defendant tortured one victim before shooting her in back of head after he ordered her to walk away from him and defendant stripped second victim, raped her, shot her in head and flung her nude body into parking lot); *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984), *cert. denied*, 472 U.S. 1012 (1985) (defendant tied one victim's hands behind her, stuffed sock down her throat, tape mouth and neck, forced her in closet, shot her point blank, doused her with accelerant and set her on fire, and left her still alive and breathing to die of smoke inhalation; attempted to incinerate second victim); *Clozza v. Commonwealth*, 228 Va. 124, 321 S.E.2d 273 (1984); *cert. denied*, 469 U.S. 1230 (1985) (defendant beat 13-year-old victim for over two hours, raped her and penetrated her vagina with twigs and large cylindrical object before internal bleeding suffocated her); *Fitzgerald v. Commonwealth*, 223 Va. 615, 292 S.E.2d 798 (1982), *cert. denied*, 459 U.S. 1228 (1983) (defendant inflicted 184 stab wounds with machete and knife, all sustained before victim's death); *LeVasseur v. Commonwealth*, 225 Va. 564, 304 S.E.2d 644 (1983), *cert. denied*, 464 U.S. 1063 (1984) (victim sustained at least 43 wounds and lacerations; back of head crushed by blows with blunt instrument; ice pick and two-pronged carving fork found protruding from victim's back; victim's ankles bound together; liquid bleach poured over body; and attempt to incinerate body); *Whitley v. Commonwealth*, 223 Va. 66, 286 S.E.2d 162, *cert. denied*, 459 U.S. 882 (1982) (defendant confessed to choking 63-year-old widow with bare hands, strangling her with rope, and cutting her throat; victim was found with one umbrella inserted into her vagina and another in her rectum); *Briley v. Commonwealth*, 221 Va. 563, 273 S.E.2d 57 (1980) (defendant raped woman in front of husband and child, after which woman was shot in head four times while family watched, husband was then shot in front of child, and finally child was shot); *Mason v.*

Furthermore, though defendant need not prove that his case is better than the least vile scenario yet encountered, Petitioner meets even that standard. Focusing solely on the few fact patterns which deviate from the pattern of extraordinary brutality typical of vileness cases, Petitioner's crime still does not compare with those in other death penalty cases. *See Barnes v. Commonwealth*, 234 Va. 130, 360 S.E.2d 196 (1987) (defendant shot 73-year-old victim twice, then shot another victim point blank, killing him, before returning to shoot first victim in neck; reviewing court relied upon Petitioner's case to state that defendant's actions were more vile than the minimum standard), *cert. denied*, 484 U.S. 1036 (1988); *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985) (defendant shot one victim twice, then later leaned over counter to fire two more shots into victim's body, *cert. denied*, 475 U.S. 1099 (1986); a week later, defendant repeated crime with another victim, firing twice and then returning to shoot victim twice more); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979) (willful, deliberate and premeditated murder for hire with elaborate planning in which defendant ate and drank while waiting for victim to arrive, thereafter shot victim five times with hollow bullets, took food from victim's home, and hosted party to celebrate that "[t]he beast is deceased"), *cert. denied*, 444 U.S. 1049 (1980).[20]

Commonwealth, 219 Va. 1091, 254 S.E.2d 116, *cert. denied*, 444 U.S. 919 (1979) (defendant raped 71-year-old woman, struck her several times in head and body with an ax, shoved ax handle into her rectum, drove a nail into her wrist, and set her on fire while still alive).

[20] The only other case which the Virginia Supreme Court cited as comparable to Petitioner's did not indicate that the jury

Because Petitioner's case is clearly distinguishable from the core of vileness cases, because his crime is less brutal than even the least vile cases in which the death penalty has been imposed in Virginia, and because the fact pattern in this case is considerably less violent than those present in many cases in which defendants received life sentences, subjecting Petitioner to the death penalty can only be described as arbitrary. Because there is no meaningful basis for justifying the imposition of capital punishment in this case, the sentence is unconstitutional.

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relied on the vileness factor for its recommendation of capital punishment. *See Briley v. Commonwealth*, 221 Va. 532, 273 S.E.2d 48 (1980), *cert. denied*, 451 U.S. 1031 (1981). Because the record is unclear and at best might support an argument that both future dangerousness and vileness figured in the jury's verdict, the case is inapposite to Petitioner's, in which the jury relied solely on vileness.